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## Better a Drug Dealer than a Drug Buyer - The Third Circuit Grapples with the United States Sentencing Guidelines in *United States v. Smack*

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# BETTER A DRUG DEALER THAN A DRUG BUYER? THE THIRD CIRCUIT GRAPPLES WITH THE UNITED STATES SENTENCING GUIDELINES IN *UNITED STATES v. SMACK*

## I. INTRODUCTION

In *United States v. Smack*,<sup>1</sup> the United States Court of Appeals for the Third Circuit confronted what it considered a “poorly drafted and confusing”<sup>2</sup> Application Note within the current edition of the United States Sentencing Guidelines Manual (“Sentencing Guidelines”).<sup>3</sup> In particular, the court considered the effect of the last sentence of Application Note 12 (“Application Note 12” or “Note 12”) in the context of “reverse sting” operations.<sup>4</sup> Reverse sting operations are those in which “a government agent sells or negotiates to sell a controlled substance to a defendant.”<sup>5</sup> These differ from conventional sting operations in which a government agent buys or negotiates to buy a controlled substance from a defendant.<sup>6</sup>

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1. 347 F.3d 533 (3d Cir. 2003).

2. See *id.* at 534 (stating that nebulous drafting of Application Note 12 compounds complexities of *Smack*).

3. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (providing sentencing guidelines for drug convictions resulting from both “sting” and “reverse sting” operations).

4. See *Smack*, 347 F.3d at 540 (noting “there is considerable room for argument about how Note 12 . . . should operate in [the reverse sting context]”).

5. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 14 (2003); see also *United States v. Perez de Dios*, 237 F.3d 1192, 1194 (10th Cir. 2001) (describing reverse sting as “a transaction where the government arranges for the defendant to purchase . . . drugs from an undercover government agent”); *United States v. Panduro*, 152 F. Supp. 2d 398, 403 (S.D.N.Y. 2001) (stating that “[i]n a reverse sting, the defendant agrees to buy a certain amount of drugs for a certain prearranged price”); Conrad F. Meis, Comment, *United States v. Tucker: The Illegitimate Death of the Outrageous Governmental Conduct Defense?*, 80 IOWA L. REV. 955, 955 (1995) (describing that “[i]n a reverse sting, government agents pose as dealers of contraband in transactions that they arrange”); Bobbie Stein, *Cops Make Crack in California: California’s Reverse-Sting Operation*, THE PROGRESSIVE, Apr. 1995, at 22 (describing reverse sting operation in California). The Orange County Police Department actually used powder cocaine seized in other drug busts to manufacture cocaine base or “crack.” See Stein, *supra*, at 22 (recounting “Orange County’s crack operation”). The police then used the crack for reverse stings. See *id.* (same).

6. See Damon D. Camp, *Out of the Quagmire After Jacobson v. United States: Towards a More Balanced Entrapment Standard*, 83 J. CRIM. L. & CRIMINOLOGY 1055, 1056–57 (1993) (comparing traditional “stings,” in which government agents offer to purchase contraband or illegal services from defendant, with “reverse stings,” in which law enforcement personnel act as sellers and use various techniques to promote sales of substantial quantities of narcotics to unsuspecting buyers); Meis, *supra* note 5, at 955 (“In a typical sting operation, a government agent seeks to purchase contraband to identify sellers.”). Meis also contends that although conventional sting operations have been a popular law enforcement tool for many

In other words, defendants are drug sellers in conventional stings, and defendants are drug buyers in reverse stings.<sup>7</sup>

Application Note 12 states that in unconsummated "agreement[s] to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level."<sup>8</sup> This is the rule "unless the sale is completed and the amount delivered more accurately reflects the scale of the offense."<sup>9</sup> Thus, in a conventional sting, the quantity of a controlled substance that a defendant agreed to sell determines the defendant's offense level, unless the sale is completed and the actual quantity sold suggests using a different offense level.<sup>10</sup> In a reverse sting, however, the quantity of a controlled substance that a defendant agreed to purchase may conclusively determine the defendant's offense level, regardless of the amount actually purchased.<sup>11</sup>

years, reverse stings have only recently become popular. See Meis, *supra* note 5, at 955 (discussing government use of sting operations).

7. See Amy Levin Weil, *In Partial Defense of Sentencing Entrapment*, 7 FED. SENTENCING REP. 172, 178 n.29 (1995) (explaining that in "straight sting" cases, defendant is seller of drugs); Eric Blumenson & Eva Nilsen, *The Drug War's Hidden Economic Agenda: Seizing the Property of Drug Dealers*, THE NATION, Mar. 9, 1998, at 11 [hereinafter Blumenson & Nilsen I] ("The reverse sting is an apparently lawful version of police drug dealing in which police pose as dealers and sell drugs to unwitting buyers."); Lenny Savino, *Judge Releases 33 Sting Suspects; The Kissimmee Drug Arrests, Witnessed by Lt. Gov. Frank Brogan, May be a Form of Entrapment, the Judge Said*, ORLANDO SENTINEL, Feb. 2, 1999, at D1 ("In reverse stings, undercover police officers offer to sell drugs and then arrest potential buyers."); *Weekend Edition Saturday: Asset forfeiture from drug-related arrests and how some law enforcement agencies use the funds* (National Public Radio broadcast, Apr. 27, 2002) [hereinafter *Weekend Edition*] (stating that "[i]n a traditional drug sting, undercover cops pose as drug buyers to bust a dealer. In a reverse, the cops become the seller and arrest the buyer.").

8. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003); see also *United States v. Boone*, 279 F.3d 163, 184 (3d Cir. 2002) (holding that under Sentencing Guidelines, "it is clear that the Base Offense Level for a drug-trafficking offense is a function of the quantity of the drugs involved in the offense"), cert. denied, 535 U.S. 1089 (2002); *United States v. Yeung*, 241 F.3d 321, 324 (3d Cir. 2001) (holding that "Application Note 12 to Section 2D1.1 sets forth the method by which the appropriate quantity of drugs is determined if the offense involves negotiation to traffic in drugs"); *United States v. Marmolejos*, 140 F.3d 488, 490 (3d Cir. 1998) (stating that "Application Note 12 to Section 2D1.1 addresses the method of determining the appropriate quantity if the offense involves negotiation to traffic in narcotics"); *United States v. Rodriguez*, 975 F.2d 999, 1004 (3d Cir. 1992) (explaining that Section 2D1.1 "imposes punishment for drug-related crime based on the type and weight of drugs involved in the criminal activity").

9. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003); see also *Yeung*, 241 F.3d at 325 (noting that "if a defendant is to be tarred for sentencing purposes with a larger quantity than was delivered, that quantity must have been negotiated or agreed upon prior to delivery").

10. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (stating that when quantity delivered more closely reflects scale of offense, that quantity should be used for sentencing purposes).

11. See *id.* ("In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense be-

The last sentence of Application Note 12 provides a method for drug sellers in unconsummated transactions to escape sentencing for the full amount of negotiated quantities, if the sellers show that they were either incapable of delivering or did not truly intend to deliver those quantities.<sup>12</sup> It is unclear, however, whether drug buyers involved in reverse stings are also afforded this benefit.<sup>13</sup> Although the language of Note 12 suggests they are not,<sup>14</sup> no reason is given for this exclusion and principles of fairness caution against such a result.<sup>15</sup> Furthermore, with the dramatic increase in the popularity of reverse stings in recent years,<sup>16</sup> the need for

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cause the amount actually delivered is controlled by the government, not by the defendant.”).

12. *See id.* (noting that when “the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance,” courts shall reduce their base offense level accordingly); *see also* United States v. Munoz, 233 F.3d 410, 415 (6th Cir. 2000) (holding that current Application Note 12 only requires defendants show either lack of intent or ability); United States v. Dallas, 229 F.3d 105, 109 (2d Cir. 2000) (“This provision, added in 1995, . . . [made] lack of either intent or capability a ground for reducing the quantity for which a defendant could be sentenced. The previous Note 12 had permitted a reduction . . . only if a defendant lacked both intent and capability.”).

13. For a discussion of the circuit split arising from this ambiguity, *see infra* notes 122–27 and accompanying text.

14. For a discussion of the language of Application Note 12, *see infra* notes 43–71 and accompanying text.

15. *See* United States v. Smack, 347 F.3d 533, 539 (3d Cir. 2003) (stating that “[t]raditional principles of criminal law would suggest . . . that buyers should also have the benefit of the *mens rea* and impossibility defenses in the last sentence, *mutatis mutandis*”); *see also* United States v. Raven, 39 F.3d 428, 436 n.11 (3d Cir. 1994) (interpreting prior version of Note 12 and holding it would be fundamentally unfair if only in “unconsummated drug transactions by sellers would the government have to demonstrate that the defendant intended and was able to complete the negotiated transaction”).

16. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 67 (1998) [hereinafter Blumenson & Nilsen II] (explaining that reverse stings are “now [a] common police tactic that [were] rarely . . . used before the law began channeling forfeited assets to those who seized them”); Interdisciplinary Program Series Transcript, *The New Chicago School: Myth or Reality?*, 5 U. CHI. L. SCH. ROUNDTABLE 1, 10 (1998) (quoting Tracey L. Meares) (“Reverse stings ensure that residents remain in the community. Not only that, reverse stings redistribute the consequences of law enforcement racially because it turns out that people who buy drugs are much more demographically varied than those who sell them.”); Gayle Worland, *Drug Suspects Get Cuffs, Not Cocaine: Reverse Sting in City Nets 463 Accused Buyers*, CHI. TRIB., Oct. 17, 2003, at C1 (noting that reverse sting operations “yielded more than 2,300 arrests for attempted possession of a controlled substance” in only two months). This reverse sting netted 463 buyers in a single day, making it the largest one-day effort of its kind in the nation. *See* Worland, *supra*, at C1 (describing sting operation); *see also* Blumenson & Nilsen I, *supra* note 7, at 11 (observing that “[b]uyers may be less dangerous and less culpable, but operations against them are easier and safer, and reliably result in seizure of the buyer’s cash”). Proponents of reverse stings contend they are effective drug control mechanisms and better distribute the costs of drug arrests throughout society. *See Weekend Edition, supra* note 7 (stating that “[r]everse stings used to be rare. Police departments started doing more of them

clarification of Note 12's scope has led the Third Circuit to explicitly request action by the United States Sentencing Commission ("Sentencing Commission" or "Commission").<sup>17</sup>

This Casebrief reviews the Third Circuit's critique of Application Note 12 of the Sentencing Guidelines, and also looks at its effect on the sentencing of drug traffickers.<sup>18</sup> Part II examines both Section 2D1.1 and Application Note 12 of the Sentencing Guidelines.<sup>19</sup> Part III discusses the development of the Third Circuit's approach to Application Note 12, tracing the evolution of its interpretation within that circuit.<sup>20</sup> Part IV addresses the possible effects of Application Note 12 on the sentences of individuals involved in drug trafficking.<sup>21</sup> Finally, Part V considers the potential impact of Application Note 12 on practitioners.<sup>22</sup>

## II. SECTION 2D1.1 AND APPLICATION NOTE 12

### A. Background and Purpose of Section 2D1.1

The United States Sentencing Commission promulgates the Sentencing Guidelines under statutory authority.<sup>23</sup> Pursuant to the Sentencing Reform Act of 1984 ("Reform Act"), a sentencing court generally must select a sentence for a particular offense from within the respective range recommended by the Sentencing Guidelines.<sup>24</sup> The Commission developed the Sentencing Guidelines in an effort to further the three major

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after asset forfeiture came into vogue."). Some critics of asset forfeiture point to a potential conflict of interest, as the forfeited assets go directly to the police agencies that seize them. See *id.* (describing possible conflict of interest).

17. See *Smack*, 347 F.3d at 534 (stating "[w]e . . . call upon the U.S. Sentencing Commission to revise Application Note 12 to clarify the scope of drug transactions to which the intent and capability defenses apply").

18. For a discussion of the Third Circuit's critique of Application Note 12, see *infra* notes 109–39 and accompanying text. For a discussion of Application Note 12's effect on sentencing, see *infra* notes 140–54 and accompanying text.

19. For a discussion of the background of Section 2D1.1 and Application Note 12, see *infra* notes 23–71 and accompanying text.

20. For a discussion of the development of the interpretation of Application Note 12 in the Third Circuit, see *infra* notes 72–139 and accompanying text.

21. For a discussion of the effects of Application Note 12 on the sentencing of drug traffickers, see *infra* notes 140–54 and accompanying text.

22. For a discussion of the ramifications of Application Note 12 on practitioners, see *infra* notes 155–65 and accompanying text.

23. See 28 U.S.C. § 994(a) (2004) (detailing Sentencing Commission's duty to promulgate guidelines and policy statements); see also U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1) (2003) (explaining that Commission's principal purpose "is to establish sentencing policies and practices . . . that will assure the ends of justice by promulgating . . . guidelines prescribing . . . appropriate sentences").

24. See 18 U.S.C. § 3553(b) (2004) (providing that if courts depart from sentencing range prescribed in guidelines, they must specify reasons for departure); see also *United States v. Dallas*, 229 F.3d 105, 108 (2d Cir. 2000) (noting that, regardless of agreement with Sentencing Guidelines, courts "are obliged to apply it"); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2) (2003) (maintaining that "the sentencing court must select a sentence from the guideline range").

objectives of the Reform Act: honesty, reasonable uniformity and proportionality in sentencing.<sup>25</sup>

Section 2D1.1 of the Sentencing Guidelines specifically addresses offenses involving drug trafficking and reflects an aim toward these three objectives.<sup>26</sup> In an attempt to precisely correlate the punishment of controlled substance offenses with the quantity of drugs involved,<sup>27</sup> the Sentencing Commission developed a multi-tier system of sentencing in Section 2D1.1.<sup>28</sup> This system has been said to reflect a philosophy of “incremental immorality.”<sup>29</sup>

For example, the Sentencing Guidelines mandate that a defendant with no significant criminal history who distributes fifteen grams of heroin should receive a lower offense level (Level 16),<sup>30</sup> and a correspondingly lower minimum sentence (twenty-one months),<sup>31</sup> than a defendant with an identical criminal history who distributes twenty-two grams of heroin

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25. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (2003) (explaining that “[t]o understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984”).

26. See *id.* § 2D1.1 (containing heading “Unlawful Manufacturing, Importing, Exporting, or *Trafficking* . . . ; Attempt or Conspiracy”) (emphasis added); see also *United States v. Yeung*, 241 F.3d 321, 324 (3d Cir. 2001) (“Section 2D1.1 establishes the base offense level for defendants who agree or conspire to sell drugs, based upon the quantity of drugs involved.”); *United States v. Marmolejos*, 140 F.3d 488, 490 (3d Cir. 1998) (finding that base offense levels “for defendants who act as parties to an agreement or conspiracy to sell narcotics” are established by Section 2D1.1).

27. See *United States v. Boone*, 279 F.3d 163, 184 (3d Cir. 2002) (explaining that under Section 2D1.1 “it is clear that the Base Offense Level for a drug-trafficking offense is a function of the quantity of the drugs involved in the offense”), *cert. denied*, 535 U.S. 1089 (2002); *Yeung*, 241 F.3d at 324 (noting that Section 2D1.1 uses quantity of drugs involved to determine base offense levels); *Dallas*, 229 F.3d at 107 (observing that Sentencing Commission demonstrated “zeal [in its efforts] to calibrate narcotics punishments precisely with the quantity of narcotics involved”).

28. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2003) (providing several distinct “Levels” of drug offenses); see also *Dallas*, 229 F.3d at 107 (noting that “the Sentencing Commission has specified seventeen different categories of quantities, correlating each with a different base offense level”).

29. See *United States v. Martinez-Rios*, 143 F.3d 662, 670 (2d Cir. 1998) (explaining that “the Sentencing Commission should frame guidelines that take into account the nature and degree of the harm caused by the offense”); see also *Dallas*, 229 F.3d at 107 (citing *Martinez-Rios*, 143 F.3d at 670). The *Dallas* court provided an example of the incremental immorality philosophy: a defendant who distributes fifty grams of cocaine receives a greater offense level (Level 16) and six more months of minimum punishment under the Sentencing Guidelines than a defendant who distributed forty grams (Level 14). See *Dallas*, 229 F.3d at 107 (detailing this example).

30. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(12) (2003) (setting sixteen as offense level for at least ten, but less than twenty, grams of heroin).

31. See *id.* at ch. 5, pt. A (providing minimum sentence of twenty-one months for defendant with offense level of sixteen and Criminal History Category of one).

(Level 18)<sup>32</sup> and receives a correspondingly higher minimum sentence (twenty-seven months).<sup>33</sup>

The above example demonstrates the philosophy of incremental immorality: A defendant's culpability increases with the quantity of heroin distributed,<sup>34</sup> rather than having only one level of culpability for all heroin distributions.<sup>35</sup> Similarly, the Sentencing Guidelines' concept of incremental immorality for drug offenses under Section 2D1.1 does not distinguish between defendants who actually sell or buy drugs, and those who merely attempt to do so.<sup>36</sup> Section 2D1.1 applies equally to those charged with drug trafficking and to those "who agree or conspire to sell drugs, based upon the quantity of drugs involved" when determining their respective offense levels.<sup>37</sup>

The Sentencing Guidelines contain Application Notes at the end of each section.<sup>38</sup> These notes provide guidance for the correct use of the immediately preceding section,<sup>39</sup> and must be given "controlling weight unless [they are] plainly erroneous or inconsistent with the regulation" to which they refer.<sup>40</sup> Application Note 12 to Section 2D1.1 establishes the

32. See *id.* § 2D1.1(c)(11) (setting eighteen as offense level for at least twenty, but less than forty, grams of heroin).

33. See *id.* at ch. 5, pt. A (providing minimum sentence of twenty-seven months for defendant with offense level of eighteen and Criminal History Category of one).

34. See *Dallas*, 229 F.3d at 107–08 (discussing how incremental immorality increases culpability in accordance with quantity of drugs involved in transaction).

35. See *id.* at 108 (explaining that Sentencing Guidelines assume logic of incremental immorality "[w]hether or not selling . . . more grams merits . . . more months of punishment . . .").

36. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2003) (explaining that this section applies to both "Unlawful . . . Trafficking" and "Attempt"); see also *United States v. Rodriguez*, 975 F.2d 999, 1004 (3d Cir. 1992) (stating that "Section 2D1.1 of the [G]uidelines imposes punishment for drug-related crime based on the type and weight of drugs involved in the criminal activity"); Daniel L. Abelson, Comment, *Sentencing Entrapment: An Overview and an Analysis*, 86 MARQ. L. REV. 773, 778 (2003) (noting that under Guidelines, "a defendant [is normally] held responsible for the drugs he agreed to sell to law enforcement").

37. See *United States v. Yeung*, 241 F.3d 321, 324 (3d Cir. 2001) (discussing application of § 2D1.1 to defendant's sentence); see also *Rodriguez*, 975 F.2d at 1004 (concluding Guidelines punish based on type and weight of drugs involved).

38. See generally U.S. SENTENCING GUIDELINES MANUAL (2003).

39. See, e.g., *id.* § 2D1.1, Application Notes 1–20 (2003); see also Weil, *supra* note 7, at 173 (describing guidance provided by Application Note 17 for § 2D1.1); Mark Thomas, Comment, *Sentencing Entrapment: How Far Should the Federal Courts Go?*, 33 IDAHO L. REV. 147, 180 (1996) (stating that Application Note 12 "indicates a concern" regarding Section 2D1.1 and reverse stings).

40. See *United States v. Miller*, 224 F.3d 247, 252 n.8 (3d Cir. 2000) (discussing obligation to adhere to Sentencing Guidelines (quoting *Stinson v. United States*, 508 U.S. 36, 45 (1993))); see also *United States v. Dallas*, 229 F.3d 105, 108 (2d Cir. 2000) (noting that regardless of agreement with Sentencing Guidelines, courts "are obliged to apply it"); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2) (2003) (stating that sentencing courts are required to select sentences from guideline range).

method for determining the quantity of drugs involved in offenses relating to drug trafficking negotiations.<sup>41</sup> Further, in the event that no drugs have been seized, or where the amount of drugs seized does not accurately reflect the gravity of the offense, “the Guidelines require [a] . . . court to estimate the amount of drugs involved in the offense.”<sup>42</sup>

### B. *The Development of Application Note 12*

Application Note 12 was amended twice in the 1990s.<sup>43</sup> The Commission first amended and expanded Application Note 12 in 1992, in an effort to “clarif[y] and simplif[y]” the provisions addressing unconsummated drug transactions and conspiracies to sell drugs.<sup>44</sup> This amendment made it clear that “[i]n an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount.”<sup>45</sup> Thus, in a conventional sting operation, if a defendant was arrested before selling a lower quantity of drugs to an undercover government agent than had been originally negotiated, courts often imputed the negotiated quantity to the defendant for sentencing purposes.<sup>46</sup> Courts only altered this

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41. See *Yeung*, 241 F.3d at 324 (noting Section 2D1.1 sets forth method for determining drug quantities in unconsummated negotiations to traffic drugs); see also *United States v. Smack*, 347 F.3d 533, 535 (3d Cir. 2003) (“Note 12 . . . controls the quantity used for Guidelines purposes in prosecutions arising out of stings, reverse stings, and other situations where the delivered quantity of controlled substance may differ from the agreed-upon quantity.”); *United States v. Eschman*, 227 F.3d 886, 892 (7th Cir. 2000) (Easterbrook, J., concurring) (“Application Note 12 is designed to match the penalty to the true scale of the drug operation.”).

42. *United States v. Blount*, 291 F.3d 201, 215 (2d Cir. 2002); see also *United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003) (suggesting that Application Note 12 “was designed to guide courts in assessing culpability where the amount of the drug agreed upon and the amount of the drug actually delivered were different”); *United States v. McLean*, 287 F.3d 127, 135 (2d Cir. 2002) (requiring court to approximate amount of narcotics involved); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (“Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.”).

43. Compare U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (replacing prior language with 1992 amendment), with *id.* at app. C, am. 518 (replacing 1992 amendment with 1995 amendment). See also *United States v. Marmolejos*, 140 F.3d 488, 490–91 (3d Cir. 1998) (discussing differences between 1992 and 1995 amendments).

44. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (discussing Sentencing Commission’s reasoning for 1992 amendment).

45. *Id.*; see also *United States v. Roberson*, 194 F.3d 408, 417–18 (3d Cir. 1999) (examining Application Note 12 in context of negotiation to traffic illegal substances); *United States v. Mustakeem*, 913 F. Supp. 410, 414–15 (W.D. Pa. 1995) (concluding that Application Note 12 addresses quantity of drugs defendant intended to, and was capable of, purchasing).

46. See, e.g., *United States v. Raven*, 39 F.3d 428, 432 (3d Cir. 1994) (stating that drug quantity to be used in negotiation offenses is weight of drugs contemplated during negotiations); see also *United States v. Piccolo*, 132 F. Supp. 2d 326, 332 (E.D. Pa. 2001) (discussing newer version of Application Note 12 and noting



method for determining quantity upon a finding that the defendant did not intend to produce *and* was not reasonably capable of producing the negotiated amount.<sup>47</sup> Under such circumstances, the court would exclude the amount the defendant did not intend to produce and was unable to produce from its guideline calculation.<sup>48</sup>

This amendment, however, apparently missed its laudable goals of clarity and simplicity.<sup>49</sup> Subsequent to its adoption, the Sentencing Commission acknowledged that disputes over the amendment's interpretation led to extensive litigation.<sup>50</sup> Thus, just three years later in 1995, the Commission again substantially amended Application Note 12<sup>51</sup> to its current

amount of money involved in transaction is irrelevant to calculation of offense level based on quantity of drugs involved).

47. See, e.g., *United States v. Dallas*, 229 F.3d 105, 109 (2d Cir. 2000) (discussing current and former versions of Application Note 12 and concluding current version "amended the prior version of Note 12 to make lack of either intent or capability a ground for reducing the quantity for which a defendant could be sentenced. The previous Note 12 had permitted a reduction of quantity only if a defendant lacked both intent and capability.") (internal citations omitted); see also U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (amending prior version of Application Note 12 to effectuate this change).

48. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (providing 1992 version of Application Note 12). The 1992 version stated, "where the court finds . . . the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount . . . the defendant did not intend to produce and was not reasonably capable of producing." *Id.*

49. See, e.g., *Raven*, 39 F.3d at 433 ("Not only have the courts of appeals split, but some have been unable to establish a consistent application of Note 12 even among panels."); see also *United States v. Tillman*, 8 F.3d 17, 19 (11th Cir. 1993) (finding that government bears burden of persuasion, but that it satisfies burden by showing either intent to produce or reasonable capability of producing negotiated amount of drugs); *United States v. Barnes*, 993 F.2d 680, 683-84 (9th Cir. 1993) (finding that Note 12 allocates burden of persuasion to defendant to prove lack of both intent and capacity to produce negotiated drugs); *United States v. Ruiz*, 932 F.2d 1174, 1183-84 (7th Cir. 1991) (placing burden on government to prove defendant's intent and capacity).

50. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) ("Disputes over the interpretation of this application note have produced much litigation."); see, e.g., *Raven*, 39 F.3d at 432 (stating that issue in *Raven* involved burdens of proof under Application Note 12); *United States v. Smiley*, 997 F.2d 475, 480 (8th Cir. 1993) (litigating issues under former Note 12); *Barnes*, 993 F.2d at 682-85 (same); *Tillman*, 8 F.3d at 18-19 (same).

51. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (eliminating language from former Application Note 12 and providing new terminology). The Sentencing Guidelines state:

The Commentary to § 2D1.1 captioned "Application Notes" is amended in Note 12 by deleting: "In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing."

formulation.<sup>52</sup> Similar to the former amendment, the Commission intended this most recent amendment to “provide that in a case involving negotiation for a quantity of a controlled substance, the negotiated quantity [would be] used to determine the offense level.”<sup>53</sup>

The new amendment did, however, make three important changes.<sup>54</sup> First, it made explicit<sup>55</sup> that in situations where the completed transaction, rather than the related negotiations, more accurately reflected the quantity of controlled substances involved, courts must use the quantity from the completed transaction to determine the quantity for sentencing pur-

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*Id.* The drafters inserted this amended version:

In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance – actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the courts shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

*Id.*; see also *United States v. Marmolejos*, 140 F.3d 488, 490 (3d Cir. 1998) (stating that in 1995, Amendment 518 deleted language of former Application Note 12 and inserted “a new set of instructions in its place”).

52. Compare U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (providing language of prior amendment to Application Note 12), with *id.* at app. C, am. 518 (supplying language of most recent amendment to Application Note 12), and *id.* § 2D1.1, Application Note 12 (stating current version of Application Note 12).

53. See *id.* at app. C, am. 518 (noting that “negotiation for a quantity of controlled substance” will determine offense level of defendant); see also *United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003) (stating that context of Application Note 12 suggests that “it was designed to guide courts in assessing culpability where the amount of the drug agreed upon and the amount of the drug actually delivered were different”).

54. See generally U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (highlighting changes in new amendment).

55. See, e.g., *United States v. Yeung*, 241 F.3d 321, 325 (3d Cir. 2001) (noting former Application Note 12 did not address amount of drugs to be considered in completed transactions); *Marmolejos*, 140 F.3d at 491 (stating that “Application Note 12 now specifies that the actual weight delivered, rather than the weight under negotiation, should be used for calculating a defendant’s sentence if the sale was completed”).

poses.<sup>56</sup> This provision benefits defendants who actually sold a lower quantity of drugs than they had originally negotiated to sell.<sup>57</sup>

Second, the amendment added an entirely new provision regarding reverse stings.<sup>58</sup> Current Application Note 12 now provides that, unlike a conventional sting situation, "in a reverse sting, the agreed-upon quantity of the controlled substance" more closely reflects the seriousness of the offense "because the amount actually delivered is controlled by the government, not by the defendant."<sup>59</sup> The former Note 12 made no reference to reverse stings.<sup>60</sup>

Third, the amendment significantly altered Application Note 12's final sentence.<sup>61</sup> Under the former Note 12, defendants in unconsummated drug transactions could avoid the assignment of the full negotiated

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56. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (stating that "the negotiated quantity is used to determine the offense level unless the completed transaction establishes a different quantity"); see also *Yeung*, 241 F.3d at 325 ("[I]t is quite clear from the language of amended Application Note 12 that when a sale is completed, the amount delivered will typically 'more accurately reflect[ ] the scale of the offense' unless a 'further delivery' is 'scheduled' or at the very least is 'agreed-upon.'"); *Marmolejos*, 140 F.3d at 491 (concluding that for completed transactions, current Application Note 12 utilizes actual weight delivered, instead of negotiated weight, for sentencing purposes).

57. See, e.g., *United States v. Rodriguez*, 975 F.2d 999, 1001 (3d Cir. 1992) (remanding for re-sentencing based on actual quantity sold). In *Rodriguez*, the defendants negotiated to sell 3,000 grams of cocaine to undercover DEA agents. See *id.* (stating facts of case). Instead, the defendants sold the agents a block containing 2,976 grams of boric acid covered in only 65.1 grams of cocaine. See *id.* (same). The defendants were sentenced, *inter alia*, for selling the full 3,000 grams of cocaine. See *id.* at 1002 (same). The court vacated the defendants' sentences and remanded for re-sentencing, concluding that the boric acid and cocaine did not constitute a "mixture" and, therefore, "only the 65 grams of cocaine in the three kilogram packages" were to be included for sentencing purposes. See *id.* at 1008 n.14 (noting basis for remand and sentencing considerations).

58. See *United States v. Smack*, 347 F.3d 533, 539 n.2 (3d Cir. 2003) (stating that "the old Note 12 does not advert to reverse stings, while the new Note 12 has a specific provision addressing them"); *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (stating that "this court has utilized different approaches in applying the predecessor to Application Note 12 . . . in the reverse sting context").

59. U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003); see also *United States v. Perez de Dios*, 237 F.3d 1192, 1195 (10th Cir. 2001) (finding that "[a] drug buyer who lacks the full purchase price may nonetheless intend to obtain the negotiated quantity by force or deception, or on a credit or consignment basis") (quoting *United States v. Hardwell*, 80 F.3d 1471, 1497 (10th Cir. 1996)); *Gomez*, 103 F.3d at 253 (citing *United States v. Alaga*, 995 F.2d 380 (2d Cir. 1993)) (stating that "[w]here the defendant is a buyer . . . [the defendant] negotiates for a particular quantity, [and] he or she fully intends to commit the crime as planned").

60. See, e.g., *Smack*, 347 F.3d at 539 n.2 (noting that current version of Application Note 12 specifically addresses reverse stings while prior version of Note 12 did not); *Gomez*, 103 F.3d at 253 (stating that Second Circuit has used varying approaches when applying prior versions of Application Note 12 to context of reverse stings).

61. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (discussing language of new amendment).

amount for sentencing purposes only if they demonstrated that they did not intend to provide *and* were not reasonably capable of providing the full negotiated amount.<sup>62</sup> In contrast, the current Application Note 12 allows defendants to avoid an assignment of the full negotiated amount upon a finding of either a lack of intent *or* ability.<sup>63</sup> This change has significantly lightened the burden carried by defendants seeking to reduce their offense level in unconsummated drug transactions.<sup>64</sup> Nevertheless, both versions of this final sentence essentially served the same function: they provided certain defendants in unconsummated drug transactions with a method to show that their offense level should not be determined by the quantity of drugs negotiated for sale.<sup>65</sup>

Interestingly, this final change to Note 12 under the new amendment potentially precludes drug buyers from taking advantage of this last sentence.<sup>66</sup> The last sentence of former Note 12 referred to a defendant not intending to provide and being unable to provide the "negotiated amount," a term that could refer to either drugs or money.<sup>67</sup> The new

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62. See *United States v. Munoz*, 233 F.3d 410, 415 (6th Cir. 2000) (stating that "[u]nder the current version of [Application Note 12] the defendant is only required to show a lack of intent *or* a lack of capability"); *United States v. Raven*, 39 F.3d 428, 434 (3d Cir. 1994) (stating that "the final sentence of Note 12 is conjunctive, not disjunctive: for a defendant to be sentenced on a lesser amount, the sentencing court must find both lack of intent and lack of reasonable capability").

63. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (asserting "[i]f, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance"); see also *Munoz*, 233 F.3d at 415 (stating that, under current version of Application Note 12, defendants need only show lack of either intent or ability); *United States v. Dallas*, 229 F.3d 105, 109 (2d Cir. 2000) ("This provision, added in 1995, amended the prior version of [former] Note 12 to make lack of either intent or capability a ground for reducing the quantity for which a defendant could be sentenced. The previous Note 12 . . . permitted a reduction . . . only if a defendant lacked both intent and capability.").

64. See, e.g., *Dallas*, 229 F.3d at 109 (noting that new amendment decreased defendant's burden when pleading reduction of sentence).

65. See *Raven*, 39 F.3d at 435 (stating reasonable interpretation of former version of Note 12 "as addressing how a defendant's base offense level may be determined in the first instance when a drug transaction remains unconsummated"); see also *United States v. Yeung*, 241 F.3d 321, 324 (3d Cir. 2001) (stating that "Application Note 12 to § 2D1.1 sets forth the method by which the appropriate quantity of drugs is determined if the offense involves negotiation to traffic in drugs"); *Abelson*, *supra* note 36, at 778 (stating "if the defendant shows that he 'did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance,' then the court must exclude that amount 'from the offense level determination'") (quoting U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, cmt. n.12 (2001))).

66. See, e.g., *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (finding that Note 12 only applies to defendants selling controlled substances).

67. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (stating last sentence of prior amendment); see also Kim McCormac & Stephen C. Passen, *Seventeenth Survey of Arkansas Law: Criminal Law*, 17 U. ARK. LITTLE ROCK L. REV. 481, 496-97 (1995) (discussing how, under Sentencing Guidelines, buyers are only culpable for amount of drugs they can purchase).

Note 12, however, only refers to a defendant not intending to provide or being unable to provide the "amount of controlled substance."<sup>68</sup> Buyers and sellers are both equally capable of not intending to produce, or being unable to produce, a negotiated amount of either money (for drug purchases) or drugs (for drug sales).<sup>69</sup> On the other hand, only sellers are able to produce an amount of a controlled substance.<sup>70</sup> The potential exclusion of buyers in reverse stings from the last sentence of Application Note 12 has resulted in a circuit split.<sup>71</sup>

### III. THE THIRD CIRCUIT'S APPROACH TO THE LAST SENTENCE OF APPLICATION NOTE 12

#### A. *Precedent in the Third Circuit's Jurisdiction Prior to Smack: Raven, Mustakeem and Piccolo*

##### 1. *United States v. Raven*<sup>72</sup>

The Third Circuit interpreted the former Note 12 to apply to both drug buyers and drug sellers.<sup>73</sup> For instance, in *United States v. Raven*, Donald Raven was arrested after a reverse sting while he was attempting to work as a drug courier.<sup>74</sup> Raven had planned to travel to Thailand and return with multiple kilograms of heroin, but, upon arrest, was informed that those orchestrating the journey were working for the Drug Enforcement Agency.<sup>75</sup> The precise amount that Raven had agreed to smuggle back into the country was unclear.<sup>76</sup> To determine the meaning of "produce" for purposes of Raven's intent and ability to produce the heroin at

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68. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (stating last sentence of new amendment); see also *United States v. Perez de Dios*, 237 F.3d 1192, 1193 (10th Cir. 2001) (stating that "in a reverse sting the defendant is responsible for the agreed-upon amount"); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (stating that last sentence of Application Note 12 applies only when defendants sell, not buy, drugs); *Gomez*, 103 F.3d at 253 (finding "the last sentence of Application Note 12 reveals that it applies only where a defendant is selling the controlled substance").

69. See *United States v. Smack*, 347 F.3d 533, 539 (3d Cir. 2003) (noting that traditionally buyers and sellers should have same intent and impossibility defenses).

70. See *id.* at 538–39 (noting "[b]ut on a second reading, it seems that the last sentence cannot apply to reverse stings, because it refers to 'the defendant . . . providing . . . the agreed-upon quantity of the controlled substance,' and surely the 'controlled substance' is cocaine, not dollars") (quoting U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003)).

71. For a discussion of the circuit split arising from this potential exclusion, see *infra* notes 122–27 and accompanying text.

72. 39 F.3d 428 (3d Cir. 1994).

73. See *id.* at 436 (discussing effect of Note 12 on burden of proof and twice mentioning "seller or buyer" defendant).

74. See *id.* at 430–31 (detailing facts of case).

75. See *id.* (same).

76. See *id.* at 431 (stating that on separate occasions, Raven agreed to smuggle anywhere from three to twelve kilograms of heroin).

issue,<sup>77</sup> the Third Circuit analyzed the former version of Application Note 12.<sup>78</sup>

The court in *Raven* specifically discussed former Note 12 in the context of defendants other than just drug sellers.<sup>79</sup> The *Raven* court stated that the benefits of former Note 12's final sentence must have applied to other defendants as well in order "to force the government to demonstrate [the] level of culpability [of other types of defendants] when a drug transaction remains unconsummated and . . . intent and ability to consummate the transaction are put in issue."<sup>80</sup> The court recognized that the former Application Note 12 could be interpreted as applying only to drug sellers, but rejected this argument as fundamentally unfair.<sup>81</sup> Thus, the *Raven* court concluded that under the former Note 12, any potential reduction in a defendant's offense level should be equally available to both drug sellers and drug buyers.<sup>82</sup>

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77. See *id.* at 436 (summarizing *Raven*'s argument as attempting to establish "that [because he was merely a courier] *Raven* neither intended to 'produce' nor was reasonably capable of 'producing' either heroin or money to pay for it").

78. See *id.* at 432 (quoting former Application Note 12); see also U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (stating former last sentence of Application Note 12). The former last sentence of Application Note 12 reads:

However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

*Id.*; see also *United States v. Smack*, 347 F.3d 533, 535 (3d Cir. 2003) (stating that *Raven* analyzed prior version of Application Note 12).

79. See *Smack*, 347 F.3d at 539–40 (stating that *Raven* "explicitly discussed the application of the last sentence of the old Note 12 to buyers, sellers, and couriers alike"); see also *Raven*, 39 F.3d at 436 n.11 ("[W]e reject the plausible (but unsatisfying) argument . . . that the last sentence of Note 12 applies only to drug sellers."). The *Raven* court concluded that the government should bear the burden of "demonstrat[ing] that the defendant intended and was able to complete the negotiated transaction." See *Raven*, 39 F.3d at 436 n.11 (assigning burden to government).

80. *Raven*, 39 F.3d at 436; see also *United States v. Estrada*, 256 F.3d 466, 474 (7th Cir. 2001) (stating Application Note 12 should be "theoretically [applicable] to defendants caught in such a sting").

81. See *Raven*, 39 F.3d at 436 n.11 (stating that while such argument was colorable, it was fundamentally unfair that only in "unconsummated drug transactions by sellers would the government have to demonstrate that the defendant intended and was able to complete the negotiated transaction"); see also *Smack*, 347 F.3d at 539–40 (interpreting new Note 12 stating "[t]raditional principles of criminal law would suggest . . . that buyers should also have the benefit of the *mens rea* and impossibility defenses in the last sentence, *mutatis mutandis*").

82. See *Raven*, 39 F.3d at 436 n.11 (stating that court did not believe Sentencing Commission intended for Note 12 to apply to drug sellers and not buyers).

2. United States v. Mustakeem<sup>83</sup>

In *United States v. Mustakeem*, the United States District Court for the Western District of Pennsylvania interpreted the *Raven* holding.<sup>84</sup> Mohammed Mustakeem was convicted of conspiracy to distribute and to possess with intent to distribute more than five hundred grams of a mixture containing cocaine.<sup>85</sup> Mustakeem contended that because the cocaine he sought was always either possessed or controlled by the government, he had no real ability to “provide” the cocaine at issue.<sup>86</sup>

The district court rejected this argument.<sup>87</sup> In doing so, the court concluded that “[w]hen the defendant is a drug buyer, [the former] Note 12 would address the quantity of drugs that the defendant intended to purchase and was reasonably capable of purchasing.”<sup>88</sup> This interpretation by the district court applied former Note 12’s final sentence to drug buyers, and therefore recognized that former Note 12’s last sentence applied to both conventional and reverse stings.<sup>89</sup>

83. 913 F. Supp. 410 (W.D. Pa. 1995).

84. *See id.* at 415 (following Third Circuit’s decision that Note 12 applies to both buyers and sellers).

85. *See id.* at 411 (discussing conviction).

86. *See id.* at 411 n.2 (discussing Mustakeem’s argument concerning his ability to provide cocaine in question); *see also* *United States v. Hinds*, 329 F.3d 184, 187 n.5 (D.C. Cir. 2003) (litigating meaning of “provide”). In *Hinds*, defendant Gregorio Hinds sold narcotics to an undercover police officer on three occasions. *See Hinds*, 329 F.3d at 185 (explaining transactions between Hinds and officer). The second transaction was supposed to be for powder cocaine, but the officer asked Hinds if he could, instead, turn it into crack. *See id.* (quoting officer’s request). Hinds agreed and went to a friend for assistance with the conversion; the friend declined to do it himself, and sent Hinds to an unidentified individual to complete the process. *See id.* (stating cocaine was turned into crack in Hinds’s presence). Unbeknownst to Hinds, the friend was working as an informant for the police officer. *See id.* (stating relationship with officer). Hinds was sentenced based on both the crack and the powder cocaine sales. *See id.* at 185–86 (aggregating crack and cocaine sales to determine Hinds’ base offense level). Hinds argued that but for the informant, he would not have been able to “provide” the crack under Application Note 12 and, therefore, it should have been excluded for sentencing purposes. *See id.* at 187–88 (stating Hinds’s contention that he was not “reasonably capable of providing the crack without the assistance of the government informant”). The court rejected this argument. *See id.* at 188 (concluding nothing in Application Note 12 suggests Sentencing Commission intended defendant’s interpretation).

87. *See Mustakeem*, 913 F. Supp. at 414 (rejecting Mustakeem’s argument that he could not produce drugs at issue).

88. *Id.* at 414–15 (quoting *United States v. Raven*, 39 F.3d 428, 437 (3d Cir. 1994)); *see also* *United States v. Estrada*, 256 F.3d 466, 474 (7th Cir. 2001) (stating Application Note 12 should be “theoretically [applicable] to defendants caught in . . . a [reverse] sting”).

89. *See Mustakeem*, 913 F. Supp. at 414–15 (quoting Third Circuit and finding that word “produce” should be interpreted flexibly depending on circumstances).

3. *United States v. Piccolo*<sup>90</sup>

In contrast, at least one court within the Third Circuit's jurisdiction has limited the last sentence of the current Note 12 to drug sellers only.<sup>91</sup> In *United States v. Piccolo*, the United States District Court for the Eastern District of Pennsylvania had the opportunity to assess the effects of the most recent amendment to Application Note 12 in the context of reverse stings.<sup>92</sup> Salvatore Piccolo was put into contact with an alleged "major cocaine trafficker" who was, in fact, an undercover agent with the Federal Bureau of Investigation ("FBI").<sup>93</sup> In the subsequent reverse sting, Piccolo purchased ten kilograms of cocaine from the agent, and was convicted of "conspiracy to distribute and possess with intent to distribute five or more kilograms of cocaine."<sup>94</sup>

In his case, Piccolo attempted to utilize the last sentence of the newly amended Application Note 12 to reduce his offense level.<sup>95</sup> In response, the district court found that, given the new language of Application Note 12, Piccolo's interpretation of the Note was "completely incorrect because Piccolo was the customer, not the supplier."<sup>96</sup> Further, the court held that when "the defendant is the buyer of the drugs and negotiates for a particular quantity, the amount of money exchanged for the drugs is irrelevant when determining the quantity of drugs to be used in calculating the offense level."<sup>97</sup> Thus, the *Piccolo* court concluded that only sellers may utilize the last sentence of the current Application Note 12.<sup>98</sup>

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90. 132 F. Supp. 2d 326 (E.D. Pa. 2001).

91. *See id.* at 332 (finding defendant's assertion—that drugs he was incapable of providing be excluded from sentencing calculation—incorrect because defendant was buyer).

92. *See id.* at 331–32 (discussing sentencing entrapment guideline in relation to reverse sting operation).

93. *See id.* at 328 (setting forth facts of case).

94. *See id.* (specifying charges against Piccolo).

95. *See id.* at 332 (concluding that Piccolo was attempting to use last sentence of Application Note 12 to "re-litigate" issue of downward sentence departure).

96. *See id.* (rejecting Piccolo's appeal and stating holding of case); *see also* *United States v. Perez de Dios*, 237 F.3d 1192, 1195 (10th Cir. 2001) (noting that "Application Note 12 controls, and [the defendant] is held responsible for the quantity of cocaine that he agreed to purchase"); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (stating that "[t]he last sentence of application note 12 . . . deals with a defendant selling drugs"); *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (concluding that "Application Note 12 . . . applies only where a defendant is selling the controlled substance").

97. *See Piccolo*, 132 F. Supp. 2d at 332 (explaining Application Note 12); *see also* *Perez de Dios*, 237 F.3d at 1193 (stating that "in a reverse sting the defendant is responsible for the agreed-upon amount"); *United States v. Mustakeem*, 913 F. Supp. 410, 414–15 (W.D. Pa. 1995) (determining that "[w]hen the defendant is a drug buyer, Note 12 would address the quantity of drugs that the defendant intended to purchase and was reasonably capable of purchasing").

98. *See Piccolo*, 132 F. Supp. 2d at 332 (denying applicability of last sentence of Application Note 12 to buyers of drugs).



B. United States v. Smack: *The Third Circuit Considers the Last Sentence of Current Application Note 12*

1. *The Factual Background of Smack*

The facts of *Smack* are generally representative of reverse sting situations.<sup>99</sup> The FBI monitored several conversations between Michael Reis, a witness cooperating with the FBI, and John Shields.<sup>100</sup> Shields was hoping to purchase cocaine from Reis, and told Reis about his associate, Smack, who would aid in the cocaine's purchase and distribution.<sup>101</sup>

The precise quantity of cocaine that Shields and Smack agreed to buy from Reis was difficult to determine.<sup>102</sup> The court found that "[i]t might have been as much as five kilograms, plus five more on credit, as Shields and Reis discussed initially."<sup>103</sup> After at least eight phone conversations, the three met and discussed paying \$54,000 for three kilograms, with four more kilograms provided on credit.<sup>104</sup> Despite these negotiations, Shields brought only about \$18,000 to the meeting.<sup>105</sup> This was enough for Shields to purchase only a single kilogram.<sup>106</sup> Shields claimed he would have the rest of the money within a few hours, though both Shields and Smack were arrested upon receipt of the single kilogram of cocaine.<sup>107</sup> Smack pleaded guilty to attempting to possess and distribute approximately ten kilograms of cocaine.<sup>108</sup>

2. *Defining the Issues Presented by the Current Application Note 12*

*Smack* provided the Third Circuit with an opportunity to interpret the current Application Note 12, and the court concluded that "Note 12 is opaque and confusing."<sup>109</sup> While the *Smack* court did not address the Eastern District's holding in *Piccolo*, it did state that even though *Raven*

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99. See *United States v. Smack*, 347 F.3d 533, 535 (3d Cir. 2003) (indicating operation "was a reverse sting"); see, e.g., *United States v. Panduro*, 152 F. Supp. 2d 398, 400–02 (S.D.N.Y. 2001) (buying cocaine from undercover agent). But see *United States v. Hinds*, 329 F.3d 184, 187 n.5 (D.C. Cir. 2003) (blurring distinction between reverse and conventional stings, when government informant arranges crack preparation for defendant to sell to police in conventional sting). For a discussion of the notable facts of *Hinds*, see *supra* note 86 and accompanying text.

100. See *Smack*, 347 F.3d at 535 (discussing information obtained through monitoring).

101. See *id.* (detailing conversations regarding purchase of cocaine).

102. See *id.* (discussing purchasing as little as three to as many as ten kilograms of cocaine).

103. See *id.* (discussing court's assessment of quantity involved).

104. See *id.* (specifying terms of transaction).

105. See *id.* (noting that participant brought less money than previously discussed).

106. See *id.* (noting amount of cocaine Shields could purchase with \$18,000).

107. See *id.* (noting immediate arrest).

108. See *id.* at 537 (stating terms of plea agreement).

109. See *id.* at 538 (noting ambiguity of current Application Note 12); see also *United States v. Yeung*, 241 F.3d 321, 326 (3d Cir. 2001) (recommending that Application Note 12 receive further revision); *United States v. Gomes*, 177 F.3d 76,

analyzed the former Note 12, there was good reason to continue to treat *Raven* as precedential.<sup>110</sup> In *Raven*, the Third Circuit had concluded that the last sentence of former Note 12 applied to both buyers and sellers in unconsummated drug transactions and, therefore, applied to buyers in reverse stings.<sup>111</sup> In considering *Raven*'s holding, the *Smack* court enumerated the distinctions between the former version of Note 12 applicable in *Raven* and the current version applicable in *Smack*.<sup>112</sup> The court concluded that none of these distinctions seemed "to compel the view that the new Note 12 has necessarily consigned *Raven* to the trash heap."<sup>113</sup>

The earlier version of Application Note 12 at issue in *Raven*, however, did not specifically address reverse stings.<sup>114</sup> In contrast, the current Note 12 added language regarding reverse stings.<sup>115</sup> This addition provided that "in a reverse sting, the agreed-upon quantity of the controlled substance [shall be used to determine] the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant."<sup>116</sup> This may imply that the negotiated amount is the exclusive

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85 (1st Cir. 1999) (suggesting language of Application Note 12 "still needs refinement").

110. See *Smack*, 347 F.3d at 540 (deciding that argument by *Smack*'s original counsel was supported by good faith basis).

111. See *United States v. Raven*, 39 F.3d 428, 436 n.11 (3d Cir. 1994) (concluding it was fundamentally unfair that only in "unconsummated drug transactions by sellers would the government have to demonstrate that the defendant intended and was able to complete the negotiated transaction").

112. See *Smack*, 347 F.3d at 535 (stating prior version of Application Note 12 applied in *Raven*). The *Smack* court stated three major differences between the version of Note 12 considered in *Raven* and the version considered in *Smack*. See *id.* at 539 n.2 (discussing differences). First, "the old Note 12 [did] not advert to reverse stings, while the new Note 12 has a specific provision addressing them." *Id.* Second, the former Note 12 referred to a defendant providing a "negotiated amount," while the current Note 12 refers to a defendant providing an "amount of a controlled substance." See *id.* (contrasting language). Third, "the defenses [of lack of intent and inability] in the old Note 12 are phrased in the conjunctive, while the defenses in the new Note 12 are phrased in the disjunctive." *Id.* For a discussion of these differences, see *supra* notes 54–71 and accompanying text.

113. See *Smack*, 347 F.3d at 539 n.2 (finding that *Raven* may still be legitimate precedent).

114. See, e.g., *id.* (stating that "the old Note 12 does not advert to reverse stings, while the new Note 12 has a specific provision addressing them"); *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (stating that "this court has utilized different approaches in applying the predecessor to Application Note 12 . . . in the reverse sting context").

115. See *Smack*, 347 F.3d at 539 n.2 (distinguishing prior version of Application Note 12 from current version by, *inter alia*, pointing to specific reference to reverse stings in current version); *Gomez*, 103 F.3d at 253 (stating that Second Circuit has used varying approaches in applying prior versions of Application Note 12 in reverse sting context).

116. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003).

method of determining the scale of the offense in reverse stings.<sup>117</sup> Further, the current Note 12 also altered its final sentence to read:

If . . . the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the courts shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.<sup>118</sup>

These changes may exclude buyers—and therefore defendants—in reverse stings from the benefits of the current Note 12's last sentence.<sup>119</sup> This is so because Note 12's final sentence now refers to a defendant providing a controlled substance, "and surely the 'controlled substance' is [a drug], not dollars."<sup>120</sup> Because of these changes, it is unclear whether defendants in reverse sting situations can take advantage of the last sentence of current Application Note 12.<sup>121</sup>

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117. See, e.g., *United States v. Perez de Dios*, 237 F.3d 1192, 1193 (10th Cir. 2001) (stating that, for sentencing purposes, defendants arrested in reverse stings are responsible for negotiated amount regardless of amount of controlled substance actually exchanged); see also *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (opining that last sentence of Application Note 12, which provides alternative method of sentence calculation, only deals with defendants selling drugs and, therefore, "clearly does not apply" in reverse stings).

118. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003).

119. See *Brassard*, 212 F.3d at 58 (stating that last sentence of Note 12 does not apply to reverse stings); *Gomez*, 103 F.3d at 253 (finding that plain language of last sentence of current Application Note 12 "reveals that it applies only where a defendant is selling the controlled substance").

120. *Smack*, 347 F.3d at 538–39; see also *Brassard*, 212 F.3d at 58 (stating that "[t]he last sentence of application note 12 . . . deals with a defendant selling drugs, [and] clearly does not apply [to reverse stings]"); *Gomez*, 103 F.3d at 253 (stating that "[t]he plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is selling the controlled substance"); *United States v. Alaga*, 995 F.2d 380, 383 (2d Cir. 1993) (discussing prior version of Note 12 and stating that "[t]he language of [Application Note 12] clearly indicates that the negotiated quantity is conclusive except where the defendant was the putative seller and neither intended nor was able to produce that amount").

121. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 14 (2003) (stating that, in reverse stings, negotiated amount is more appropriate for sentencing determination). The Sentencing Guidelines conclude that because the government controls the amount delivered in reverse stings, the agreed upon quantity more accurately reflects culpability. See *id.* (noting government control of quantity of substance prevents accurate sentencing on amount delivered). The Sentencing Guidelines state:

[I]n a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the courts shall exclude from

The *Smack* court noted that this possibility—that the last sentence of Note 12 does not apply to reverse sting defendants—has created a circuit split.<sup>122</sup> The First, Second and Tenth Circuit Courts of Appeals all appear to have concluded that the last sentence of Application Note 12 does not apply to reverse stings.<sup>123</sup> The Second Circuit has provided a representative explanation as to why this is so:

The plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance, that is, where the defendant “*provid[es]* the agreed-upon quantity of the controlled substance.” It is hard to believe that the narrowness of this language is inadvertent, coming immediately after a discussion of what happens in a reverse sting, where the government agent “provides” the controlled substance and the defendant provides only the money to purchase it.<sup>124</sup>

This reasoning, however, is not necessarily conclusive.<sup>125</sup> For example, the Seventh and Ninth Circuit Courts of Appeals appear to apply the last sentence of Application Note 12 to reverse stings.<sup>126</sup> Moreover, in

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the offense level determination the amount of controlled substance that the defendant establishes that he or she did not intend to provide or was not reasonably capable of providing.

*Id.*; see also *Smack*, 347 F.3d at 538–39 (finding that Application Note 12 demands that agreed-upon quantity be used for sentencing purposes). In *Smack*, the court stated:

[Application Note 12] seems to command that the agreed-upon quantity of controlled substance, regardless of amount delivered, be used for sentencing in a prosecution arising out of a reverse sting. On the other hand, it seems to immediately qualify that statement (“If, however . . .”), and provide the defendant some relief by way of “establish[ing] lack of ability or lack of intent. But on a second reading, it seems that the last sentence cannot apply to reverse stings, because it refers to “the defendant . . . providing . . . the agreed-upon quantity of the controlled substance,” and surely the “controlled substance” is cocaine, not dollars.

*Id.* at 539; see also *United States v. Gomes*, 177 F.3d 76, 79 (1st Cir. 1999) (stating language of Application Note 12 “still needs refinement”).

122. See *Smack*, 347 F.3d at 539 (finding that “there seems to be a circuit split on this question”).

123. See *United States v. Perez de Dios*, 237 F.3d 1192, 1193 (10th Cir. 2001) (“[I]n a reverse sting the defendant is responsible for the agreed-upon amount.”); *Brassard*, 212 F.3d at 58 (“The last sentence of application note 12, . . . which deals with a defendant selling drugs, clearly does not apply [to reverse stings].”); *Gomez*, 103 F.3d at 253 (providing that Application Note 12’s plain language dictates that it should only apply when defendants sell drugs).

124. *Gomez*, 103 F.3d at 253.

125. See, e.g., *Smack*, 347 F.3d at 539 (“The Second Circuit’s view is not universal.”).

126. See *United States v. Minore*, No. 99-30381, 2002 U.S. App. LEXIS 12420, at \*3 (9th Cir. June 17, 2002) (concluding that defendant had been caught in reverse sting and “Application Note 12 . . . addresses the situation presented.”); *United States v. Estrada*, 256 F.3d 466, 474 (7th Cir. 2001) (“[E]ven though Note

*Smack*, the Third Circuit suggested, but did not decide, that in “an offense involving an agreement to sell a controlled substance, [the last sentence] of Note 12 applies” regardless of whether the defendant was a buyer or seller.<sup>127</sup>

Further, the *Smack* court went on to note that the current Note 12 does not specifically address drug buyers at *any* point,<sup>128</sup> and that this is a significant shift from the former version.<sup>129</sup> The court argued that such an omission is counter to “traditional principles of criminal law.”<sup>130</sup> If drug sellers may obtain the benefit of an offense level reduction by showing a lack of intent or ability to sell the negotiated quantity, buyers also should be able to obtain the same benefit by a similar showing.<sup>131</sup>

Finally, even if Application Note 12 is assumed to apply to both buyers and sellers, exclusive of defendants in reverse stings,<sup>132</sup> then “we would be left with the peculiar result that [the] defenses [of lack of intent or ability] would be available to all traffickers in controlled substances *except buyers in reverse stings*.”<sup>133</sup> Such a result would mean that a defendant arrested while attempting to buy drugs from an ordinary drug dealer would have the

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[12] does not refer explicitly to reverse [stings], we have recognized that it theoretically has applicability to defendants caught in such a sting.”).

127. See *Smack*, 347 F.3d at 538 (suggesting last sentence of Application Note 12 applies equally to buyer and seller).

128. See *id.* at 539 (“[A]s to buyers in general, Note 12 seems to be silent—the last sentence speaks only to sellers, . . . and nothing in the note speaks to buyers.”); see also *United States v. Yeung*, 241 F.3d 321, 325 (3d Cir. 2001) (“[I]t is quite clear from the language of amended Application Note 12 that when a sale is completed, the amount delivered will typically ‘more accurately reflect[ ] the scale of offense.’”); *United States v. Marmolejos*, 140 F.3d 488, 491 (3d Cir. 1998) (“Application Note 12 now specifies that the actual weight delivered, rather than the weight under negotiation, should be used for calculating a defendant’s sentence if the sale was completed.”).

129. See *Smack*, 347 F.3d at 539 n.2 (stating that prior version of “Note 12 refer[red] to the ‘negotiated amount’—which could refer to money—while the new Note 12 refer[red] to ‘amount of controlled substance,’ thus excluding buyers”); see also U.S. SENTENCING GUIDELINES MANUAL app. C, am. 447 (2003) (restating prior version of Note 12 as “the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable [offense level] . . . [unless] the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount.”).

130. See *Smack*, 347 F.3d at 539 (discussing unusual result of this conclusion).

131. See *id.* (describing Application Note 12’s failure to apply to buyers in reverse stings as “peculiar”).

132. See *id.* at 535 (stating that “Note 12 . . . controls the quantity used for Guidelines purposes in prosecutions arising out of stings, reverse stings, and other situations where the delivered quantity of controlled substance may differ from the agreed-upon quantity”).

133. See *id.* at 539 (finding this result unusual); see also *United States v. Raven*, 39 F.3d 428, 436 n.11 (3d Cir. 1994) (“[I]t seems to us fundamentally unfair that only in cases involving unconsummated drug transactions by sellers would the government have to demonstrate that the defendant intended and was able to complete the negotiated transaction. We do not believe that the Sentencing Commission intended such a result.”).

benefits of the last sentence of Note 12, while a defendant attempting to buy the same drugs from the government in a reverse sting would not.<sup>134</sup> This outcome runs counter to the Sentencing Commission's notion of "incremental immorality."<sup>135</sup> There is no apparent reason why the culpability, and hence, the deservedness of lengthier sentences, of defendants involved in reverse stings is any greater than the culpability of ordinary sellers and buyers.<sup>136</sup>

The *Smack* court did not purport to resolve the proper construction of Application Note 12,<sup>137</sup> but was ostensibly calling "upon the U.S. Sentencing Commission to revise Application Note 12 to clarify the scope of drug transactions to which the intent and capability defenses apply."<sup>138</sup> Indeed, the court went so far as "to send a copy of [its] opinion . . . to the Chairwoman and members of the U.S. Sentencing Commission and its General Counsel."<sup>139</sup>

#### IV. GETTING PUNISHED: THE EFFECTS OF APPLICATION NOTE 12 ON SENTENCING

##### A. *Better a Drug Seller than a Drug Buyer? The Effects of Differential Treatment under Application Note 12*

When a drug transaction is completed, Application Note 12 provides that the amount actually exchanged will determine the scale of the offense.<sup>140</sup> This rule applies to all *completed* drug transactions, including st-

134. See *Smack*, 347 F.3d at 539 (explaining that use of Application Note 12 in this way would result in its application to *all* drug traffickers except buyers in reverse stings).

135. See *United States v. Martinez-Rios*, 143 F.3d 662, 669–70 (2d Cir. 1998) (explaining concept of "incremental immorality"); see also *United States v. Dallas*, 229 F.3d 105, 107 (2d Cir. 2000) (citing *Martinez-Rios*, 143 F.3d at 670) (discussing incremental immorality); *Raven*, 39 F.3d at 436 n.11 (finding this result "fundamentally unfair").

136. See, e.g., *United States v. Hinds*, 329 F.3d 184, 188 (D.C. Cir. 2003) (stating that context of Application Note 12 suggests that "it was designed to guide courts in assessing culpability" where there is variation between agreed-upon amount of controlled substance and amount actually delivered).

137. See *Smack*, 347 F.3d at 540 ("We offer none of this commentary as a holding on the proper construction of Note 12 as it now stands.").

138. *Id.* at 534. The Sentencing Commission notices when there is extensive litigation over Application Notes. See, e.g., U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (noting that "interpretation of this application note has produced much litigation"). Specifically, the provisions in Application Note 12's prior versions have caused significant litigation. See, e.g., *Raven*, 39 F.3d at 432 (stating that issue in *Raven* involved burdens of proof under former Application Note 12); *United States v. Tillman*, 8 F.3d 17, 19 (11th Cir. 1993) (litigating other issues under prior version of Application Note 12); *United States v. Smiley*, 997 F.2d 475, 481 n.8 (8th Cir. 1993) (same); *United States v. Barnes*, 993 F.2d 680, 683 (9th Cir. 1993) (same).

139. *Smack*, 347 F.3d at 540–41.

140. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (providing that if "the sale is completed and the amount delivered more

ings, reverse stings and transactions the government only observed.<sup>141</sup> Interpretational problems arise, however, when the transactions remain *uncompleted*.<sup>142</sup> In these situations, it is the amount under negotiation that will determine the scale of the offense.<sup>143</sup>

Application Note 12 permits drug sellers in unconsummated transactions to show that they were either incapable or did not actually intend to go through with the negotiated transaction.<sup>144</sup> There is, however, a circuit split regarding whether buyers are afforded the same opportunity.<sup>145</sup> The language of Note 12 seems to imply that they are not.<sup>146</sup>

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accurately reflects the scale of the offense," then that amount shall be used for sentence determination).

141. See *id.* § 2D1.1 (stating that section applies to all "offenses involving drugs"); see, e.g., *United States v. Yeung*, 241 F.3d 321, 324 (3d Cir. 2001) (concluding that Application Note 12 provides method for determining quantity if offense involves negotiation to traffic in drugs).

142. See, e.g., *United States v. Boone*, 279 F.3d 163, 184 (3d Cir. 2002) (providing that Application Note 12 requires analysis of quantity of drugs "involved" and "all relevant conduct"), *cert. denied*, 535 U.S. 1089 (2002); *Yeung*, 241 F.3d at 324 (finding that for unconsummated transactions, Application Note 12 "establishes the base offense level for defendants who agree or conspire to sell drugs, based upon the quantity of drugs involved").

143. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (providing that in "an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level").

144. See *id.* (stating that if "defendant[s] establish[ ] that [they] did not intend to provide, or [were] not reasonably capable of providing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination" amount defendants did not intend or could not provide).

145. For a discussion of this circuit split, see *supra* notes 122–27 and accompanying text.

146. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (referring only to inability or lack of intent to provide negotiated amount of "controlled substance"). The potential inequity of such a limitation is illustrated by the following example. Presume defendant X is the target of a conventional sting, and X agrees to sell fifty grams of heroin to undercover agents. See, e.g., *United States v. Dallas*, 229 F.3d 105, 107 (2d Cir. 2000) (setting forth facts of traditional sting operation); *Camp*, *supra* note 6, at 1056 (describing conventional stings as operations in which government agents offer to purchase contraband from defendants). X is arrested before making the exchange. See, e.g., *United States v. Munoz*, 233 F.3d 410, 412 (6th Cir. 2000) (arresting defendant before completing exchange). If X is able to show that X either never actually intended to provide or was unable to provide the full fifty grams, but instead only intended to, or was able to, provide five grams, then the last sentence of Application Note 12 excludes the extra forty-five grams from X's sentence determination. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (providing that when defendants establish lack of intent or ability to provide some of negotiated amount of controlled substance, courts must exclude that portion for sentencing purposes). Making such a showing is not impossible; X could show that X was attempting to trick the agent, whom X believed to be an unwitting buyer, into paying for fifty grams and getting only five. See, e.g., *Dallas*, 229 F.3d at 109 (stating that once government shows defendant's initial intent to provide agreed-upon amount, burden shifts to defendant to "produce evidence tending to establish lack of intent or inability to deliver the alleged quantity of drugs") (quoting

The defenses of inability and lack of intent provided in Note 12 yield lower sentences for defendants who are able to use them successfully.<sup>147</sup> Although Section 2D1.1 is directed toward drug “trafficking” and, in general, treats drug buyers and sellers the same for sentencing purposes, Application Note 12 makes no mention of drug buyers.<sup>148</sup> Further, Note 12 links the use of these defenses specifically to an inability or lack of intent

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United States v. Hazut, 140 F.3d 187, 193 (2d Cir. 1998)); United States v. Rodriguez, 975 F.2d 999, 1001 (3d Cir. 1992) (discussing defendants’ attempt to pass off small quantity of cocaine as much larger quantity). Therefore, X would be sentenced as if X only sold five grams. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (stating if defendants make this showing, then “court[s] shall exclude” quantity defendants were unable or did not intend to provide from sentence determination).

On the other hand, presume instead that X is the target of a reverse sting, and that X agreed to purchase fifty grams of heroin from undercover agents. See, e.g., United States v. Perez de Dios, 237 F.3d 1192, 1194 (10th Cir. 2001) (setting forth facts of traditional reverse sting operation); Meis, *supra* note 5, at 955 (describing reverse stings as operations where “government agents pose as dealers of contraband in transactions that they arrange”). X is arrested before making the exchange, and X is able to show either that X did not actually intend to buy or was incapable of buying the full fifty grams. See United States v. Panduro, 152 F. Supp. 2d 398, 400 (S.D.N.Y. 2001) (finding that defendant caught in reverse sting did not intend to purchase full amount charged). If the last sentence of Application Note 12 does not apply to reverse stings, then X’s showing does not affect X’s sentence. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (referring only to lack of intent or ability to provide negotiated amount of controlled substance, not money). Therefore, X is sentenced as if X purchased the full fifty grams. See *id.* (concluding that, in reverse stings, agreed-upon quantity more accurately reflects scale of offense for sentencing purposes).

Finally, these examples can be taken to a theoretical extreme. Presume that X is a drug dealer and Y is a drug buyer. The police listen to X and Y’s conversations and discover that X has agreed to sell fifty grams of heroin to Y, who has agreed to purchase it. Both X and Y are arrested before making the exchange. They both are able to show that they either did not actually intend to provide or were incapable of providing the other party with the negotiated amount. For instance, X might prove that X did not have access to more than thirty grams, while Y might prove that Y only had enough money for thirty grams. If the last sentence of Application Note 12 does not apply to drug buyers, then only X’s sentence is determined as if X sold only thirty grams. Y, on the other hand, would be sentenced as if Y bought fifty grams. Though there appears to be no direct precedent addressing such a sentencing aberration, the aforementioned examples seem to necessitate it. These results run counter to the Sentencing Commission’s policy of incremental immorality: the different punishments do not appear to be linked to culpability. See United States v. Martinez-Rios, 143 F.3d 662, 670 (2d Cir. 1998) (referring to Sentencing Guidelines as demonstrating incremental immorality); see also *Dallas*, 229 F.3d at 107–08 (providing example showing that Sentencing Guidelines increase minimum sentences in relation to increases in quantity of drugs involved); cf. United States v. Hinds, 329 F.3d 184, 188 (D.C. Cir. 2003) (suggesting Application Note 12 appears to have been designed to guide courts in determining culpability).

147. See United States v. Smack, 347 F.3d 533, 539 (3d Cir. 2003) (describing defenses provided by Application Note 12 as beneficial).

148. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2003) (referring to both drug sales and purchases generically as “trafficking”); see also, e.g., *Smack*, 347 F.3d at 539 (stating that “[Note 12] speaks to buyers”).



to provide a negotiated quantity of a *controlled substance*.<sup>149</sup> Several circuit courts have concluded that these factors categorically exclude drug buyers from using the Note 12 defenses.<sup>150</sup> Moreover, even the *Smack* court found this logic “seemingly compelling.”<sup>151</sup>

In *Smack*, the court pointed to the possibility that Application Note 12 does not categorically exclude all buyers, but perhaps, only buyers in reverse stings.<sup>152</sup> Understandably, the court found that possibility unsatisfactory.<sup>153</sup> Further, even if Note 12 does exclude only buyers in reverse stings, it still creates an inequitable result, namely, that it may often be more advantageous to be a drug dealer than a drug buyer for sentencing purposes.<sup>154</sup>

### B. Advice to Practitioners

In *Raven*, the Third Circuit deliberately avoided an interpretation of the former Application Note 12 that excluded drug buyers.<sup>155</sup> The current Note 12 makes it more difficult for courts to avoid the conclusion that at least buyers in reverse stings, and perhaps buyers altogether, are excluded from the benefits of the last sentence of Application Note 12.<sup>156</sup> Although the court in *Smack* did not rule on the correct interpretation of the current Note 12, it did mention the possibility that *Raven* may not have

149. See U.S. SENTENCING GUIDELINES MANUAL § 2D1.1, Application Note 12 (2003) (providing for defense of lack of ability or intent only when defendant fails to provide agreed-upon quantity of controlled substance).

150. See, e.g., *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (concluding that Application Note 12 does not apply in context of reverse stings); *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (finding that Application Note 12 applies only when defendant is drug seller).

151. See *Smack*, 347 F.3d at 539 (describing logical strength of categorical exclusion of buyers from Application Note 12).

152. See *id.* (suggesting possible interpretation of Application Note 12).

153. See *id.* (finding this possibility “peculiar” and “a bit warped”). For a discussion of the *Smack* court’s critique of this result, see *supra* notes 132–36 and accompanying text.

154. See, e.g., *United States v. Raven*, 39 F.3d 428, 436 n.11 (3d Cir. 1994) (stating that court did “not believe that the Sentencing Commission intended such a result”); see also *Smack*, 347 F.3d at 539 (explaining that “[t]raditional principles of criminal law would suggest, though, that buyers should also have the benefit of the *mens rea* and impossibility defenses in the last sentence”).

155. See *Raven*, 39 F.3d at 436 n.11 (stating that court “reject[s] the . . . argument . . . that the last sentence of Note 12 applies only to drug sellers”).

156. See, e.g., *United States v. Perez de Dios*, 237 F.3d 1192, 1193 (10th Cir. 2001) (“[I]n a reverse sting the defendant is responsible for the agreed-upon amount.”); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (stating that Application Note 12’s last sentence does not apply to reverse stings); *United States v. Gomez*, 103 F.3d 249, 253 (2d Cir. 1997) (“The plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance . . .”).

survived the Note's recent revision.<sup>157</sup> Therefore, would-be drug purchasers busted in reverse stings may be significantly disadvantaged at trial.<sup>158</sup>

Nevertheless, practitioners in the Third Circuit should be aware of *Raven's* potential vitality.<sup>159</sup> If *Raven* still controls, then drug buyers in general, including buyers in reverse stings, have access to the last sentence of Application Note 12.<sup>160</sup> This last sentence now gives defendants the option to choose either inability to provide, or lack of intent to provide, the negotiated quantity as a method of reducing the quantity of drugs used to determine sentencing.<sup>161</sup> This significantly lightens the burden from the former Note 12, which required defendants to show both inability and lack of intent.<sup>162</sup>

Practitioners in this area should be prepared, however, for the possibility that *Raven* has not survived Note 12's latest revision.<sup>163</sup> The language of the current Note 12 may preempt the logic of *Raven*.<sup>164</sup> If so, it now may be only drug sellers who have access to the defenses of the final sentence of the current Note 12.<sup>165</sup>

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157. See *Smack*, 347 F.3d at 540 (explaining that "[w]e offer none of this commentary as a holding on the proper construction of Note 12 as it now stands, nor do we decide whether *Raven* has in fact survived the revision of Note 12").

158. See *id.* at 539 (explaining that, for buyers, "Note 12 seems to be silent—the last sentence speaks only to sellers . . . and nothing in the note speaks to buyers"); see also *Perez de Dios*, 237 F.3d at 1193 ("[I]n a reverse sting the defendant is responsible for the agreed-upon amount."); *Brassard*, 212 F.3d at 58 (concluding that last sentence of Application Note 12 does not apply in reverse stings); *Gomez*, 103 F.3d at 253 ("The plain language of the last sentence of Application Note 12 reveals that it applies only where a defendant is *selling* the controlled substance . . .").

159. See *Smack*, 347 F.3d at 538 (holding *Smack's* trial counsel ineffective for failing to utilize *Raven* as relevant Third Circuit precedent).

160. See *id.* at 539 (stating that "buyers should also have the benefit of the . . . defenses in the last sentence"); see also *Raven*, 39 F.3d at 436 n.11 (stating that court "reject[s] the . . . argument . . . that the last sentence of Note 12 applies only to drug sellers").

161. See U.S. SENTENCING GUIDELINES MANUAL app. C, am. 518 (2003) (providing for sentence reduction when "defendants establish [ ] that [they] did not intend to provide, or [were] not reasonably capable of providing, the agreed-upon quantity of the controlled substance"); see also *Smack*, 347 F.3d at 539 n.2 (noting differences between former and current Application Note 12's defenses).

162. For a discussion of the changes to the former Application Note 12, see *supra* notes 54–71 and accompanying text. See also *Raven*, 39 F.3d at 434 (stating that "the final sentence of Note 12 is conjunctive, not disjunctive: for a defendant to be sentenced on a lesser amount, the sentencing court must find both lack of intent and lack of reasonable capability").

163. See *Smack*, 347 F.3d at 540 (concluding that *Raven* may not have survived Application Note 12's latest revision, but urging there is "considerable room for argument" that *Raven* should continue to operate in reverse stings).

164. See *id.* (noting that *Raven* may be preempted by current Application Note 12).

165. See, e.g., *United States v. Perez de Dios*, 237 F.3d 1192, 1193 (10th Cir. 2001) (finding that, in reverse stings, defendants are sentenced based upon agreed-upon amount); *United States v. Brassard*, 212 F.3d 54, 58 (1st Cir. 2000) (concluding that Application Note 12 does not pertain to reverse stings); *United*

## V. CONCLUSION

The Sentencing Guidelines express a philosophy of incremental immorality.<sup>166</sup> “Since the shift to a sentencing scheme that strictly ties sentencing to the quantities of drugs involved, many courts and commentators have expressed concern over the large discretion that law enforcement officials have in setting the amount of drugs ‘involved’ in a case.”<sup>167</sup> In no other situation is this danger as pronounced as in the context of reverse stings.<sup>168</sup> Thus, until the next amendment of Note 12, practitioners in the Third Circuit must wait to find out whether *Raven* has survived to ward against this danger.<sup>169</sup>

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States v. Gomez, 103 F.3d 249, 253 (2d Cir. 1997) (stating that plain language of last sentence of Application Note 12 demonstrates that it only applies when defendants are selling controlled substances).

166. See, e.g., United States v. Martinez-Rios, 143 F.3d 662, 670 (2d Cir. 1998) (suggesting that Sentencing Guidelines demonstrate incremental immorality); see also United States v. Dallas, 229 F.3d 105, 107 (2d Cir. 2000) (citing *Martinez-Rios*, 143 F.3d at 670) (noting that Sentencing Guidelines have been described as reflecting philosophy of incremental immorality).

167. United States v. Cambren, 29 F. Supp. 2d 120, 125 (E.D.N.Y. 1998), *aff'd*, No. 98-1724(L), 2001 U.S. App. LEXIS 3512 (2d Cir. Mar. 6, 2001).

168. See, e.g., United States v. Stavig, 80 F.3d 1241, 1247 (8th Cir. 1996) (stating that because of this discretion and potential for abuse, reverse sting cases “require the most careful scrutiny and a probing examination by the district court”).

169. See *Smack*, 347 F.3d at 540 (offering no decision as to whether *Raven* survived Application Note 12’s latest revision).